

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





76-7104

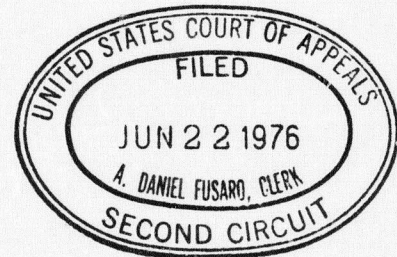
No. 76-7104  
UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

B  
P/S

KENNETH A. ANDERSON  
Plaintiff - Appellant

v.

ABEX CORPORATION; THE RETIREMENT  
BOARD OF THE RETIREMENT PLAN FOR  
SALARIED EMPLOYEES OF ABEX CORPORATION;  
DONALD K. RENNIE; and ILLINOIS CENTRAL  
INDUSTRIES, INC.  
Defendants - Appellees



APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

HON. JAMES S. HOLDEN, PRESIDING

REPLY BRIEF FOR APPELLANT

Richard J. Wright, Esq.  
DeBonis and Wright, P.C.  
25 Main Street  
Poultney, Vermont 05764  
Attorneys for Appellant



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I. Table of Cases, Statutes and other Authorities

Cases

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## ARGUMENT

### A. THE VERMONT CONNECTION

Appellees state that the only connection with Vermont is that appellant chose to move his residence here. (Appellee's Brief p. 7). This ignores the fact that the employment relationship was continued by appellees at a time when they were fully aware of the impending move. In addition to retaining appellant as a regular employee on a reduced schedule, appellees agreed to pay all travel expenses incurred by appellant in travelling away from his home in Vermont. This does not indicate that appellant commuted to New York but shows that his home was in fact considered his home office. Any travel away from his home office was at company expense because required by the nature of his duties. It would appear clear that appellees created this substantial connection with Vermont purposefully and with a full understanding of future continuous contact.

The arrangement was not entered into for the sole benefit of appellant. Appellees did not have to maintain an employment relationship with appellant after the move but could have simply allowed an immediate retirement. The benefit which appellees received, and for which they established the Vermont contact, was the continued use of appellants services.

### B. THE RETIREMENT CONTRACT

Contrary to appellees assertion, the retirement benefits were not fixed and binding prior to appellant establishing his Vermont residency. In theory the benefits could always change so long as he remained a regular employee. Whether they in fact changed would be of no consequence, but in this case they did change. Appellant's benefits continued to accrue while employed in Vermont and that period of employment changed his pension benefits in two ways. Firstly, the benefits were computed on a longer period of service, and secondly



were computed by including the full year of 1970 in determining average salary.

It does not require any facile manipulation of facts to determine that the employment contract, and retirement benefits due thereunder, became fixed only after appellant moved to Vermont. At the time of appellants retirement in April of 1971, he had fulfilled his duties and obligations and appellee Abex, and its agent appellee Retirement Board, became obligated to provide the benefits accrued to that date.

Due process limitations do not prevent a state from exercising jurisdiction over a non-resident corporate employer in connection with an action begun by a former resident employee to enforce retirement benefits accrued while employed in the forum state.

The services which appellant provided were provided in part within Vermont. This benefit to appellees was clearly foreseeable and anticipated. Addendum to Appendix, p. 7 . For this reason appellant's position is not significantly different from any resident employee of a non-resident corporation hired to work within the forum state. Conferences by telephone were a normal part of appellants duties and an expense which appellees readily assumed as a cost of the benefit. Where a part of a contract is to be performed within the forum state, there is sufficient minimum contacts to allow the exercise of jurisdiction. See, Engineering Associates of New England, Inc. vs. B & L Liquidating Corp., \_\_\_ N.H. \_\_\_, 345 A2d 900 (1975).

C. THE "50-STATE CONNECTION"

Appellant does not maintain that his position is equivalent to other former employees who have changed their residence since retirement. (Appellant's Brief, p. 12). Although it is quite arguable that in such a situation the employer and its agent administering the benefits should be subject to personal jurisdiction, it is not necessary to reach that conclusion in this case. The contacts which appellees established in the instant case are sufficient to carry



it outside the normal situation. If this court does not feel that due process allows the exercise of jurisdiction in any state in which a retiree settles, it is still possible to find the requisites present here.

D. FACT PLEADING: LONG ARM JURISDICTION

Appellees rely heavily on the decision rendered in O'Brien v. Comstock Foods, Inc. 123 Vt. 461, 194 A2d 568 (1963). In that case the Vermont Supreme Court indicated that there was a duty imposed upon plaintiffs to allege sufficient facts in their complaint to demonstrate personal jurisdiction under the long arm statutes. The suit was not dismissed on this basis but was remanded to allow the plaintiff to amend his complaint and fulfill the duty. Such a decision is consistent with the spirit of Fed. R. Civ. P. 15, from which Vt. R. Civ. P. 15 is derived.

Appellant did move to allow an amendment to be made to his complaint in the court below. Assuming arguendo that the original complaint filed in this action was insufficient to show the availability of personal jurisdiction under the long arm statute, the proper remedy would have been to allow appellant an opportunity to amend.

In the court below, appellant also filed a motion to allow interrogatories to be served on the appellees. The stated purpose of the motion was to allow full discovery of facts pertinent to a determination regarding the issue of jurisdiction. Every court has jurisdiction to determine whether it has jurisdiction. If the court has power to enjoin a party pending determination of the issue of jurisdiction /U.S. v. United Mine Workers of America, 330 U.S. 258 (1947), then it has power to allow discovery while determining the issue.

If appellant is allowed to utilize the discovery procedures outlined in the federal rules, it is entirely possible that sufficient contacts with Vermont will be discovered to allow the exercise of personal jurisdiction under

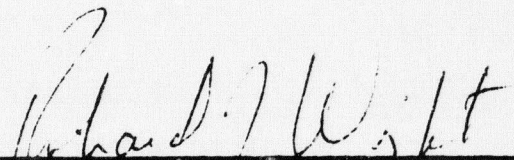


12 V.S.A. §913. It has been recognized that situations may arise where the activity in the forum state is insufficient to require registration, but sufficient to allow the exercise of personal jurisdiction in actions brought concerning matters which do not have a nexus with the activity, where they are continuous and substantial. See, Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952); Restatement (Second) of Conflict of Laws § 35; Bersch v. Drexel Firestone, Inc. 519 F2d 974 (2d Cir. 1975); cf. Aanestad v. Beech Aircraft Corp., 521 F2d 1298, 1301 n.1 (1974).

E. CONCLUSION

The contacts which appellees purposefully established with the State of Vermont are sufficient to allow the exercise of personal jurisdiction over appellees for causes connected with those contacts. If the complaint is inadequate to show them, the cause should be remanded to allow amendment of the complaint. All appellees received actual and effective notice of process and any defects in the manner of service could and should be perfected upon remand. Fed. R. Civ. P. 4(h).

DATED at Poultney, County of Rutland and State of Vermont, this 19<sup>B</sup> day of June, 1976.



Richard J. Wright, Esq.  
A member of the firm  
DeBonis and Wright, P.C.  
25 Main Street  
Poultney, Vermont 05764



NEW YORK OFFICE

OFFICE OF THE CHAIRMAN

August 27, 1970

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W.D. Raddatz	R.M. Fonquer, Jr.	J.J. Sheffield
G.L. Romine		C.G. Taylor

For several years Ken Anderson had planned to retire early from Abex and move to Vermont where he has had a home for many years. He is moving to Vermont on September 1, 1970 but we have persuaded Ken to stay on for an indefinite period of time at a reduced schedule of work to counsel and guide all functions of the Personnel Services Department, and in any other areas where George or I might request his help.

With the appointment of Fred Frost as Director of Personnel Services, the day-by-day matters in the department will be turned over to him, thereby freeing Ken of those duties. Ken has resigned as Vice President of Abex and his new title will be Assistant to President. Both Dr. Blackwell and Fred Frost will continue to report to him. A Management Bulletin on the Frost appointment as attached hereto will follow in a few days.

*Welch*

TWR/ur  
att.

Copy to: N.G. Delury



MANAGEMENT BULLETIN

EFFECTIVE SEPTEMBER 1, FRED W. FROST, JR., IS NAMED  
DIRECTOR OF PERSONNEL SERVICES FOR ABEX. MR. FROST, WHO JOINED  
THE COMPANY AS A LABOR ATTORNEY IN 1968, WILL BE IN CHARGE OF ALL  
FUNCTIONS OF THE DEPARTMENT EXCEPT THOSE REPORTING TO DR. BLACKWELL.  
BOTH MR. FROST AND DR. BLACKWELL WILL CONTINUE TO REPORT TO  
KENNETH ANDERSON.

No. 76-7104

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

KENNETH A. ANDERSON, Plaintiff

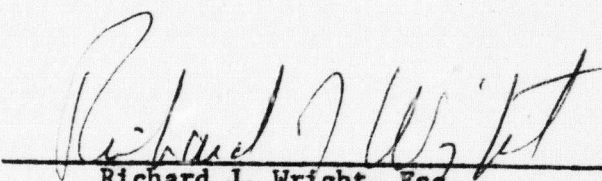
v

ABEX CORPORATION, et al., Defendants

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CERTIFICATE OF SERVICE

I, RICHARD J. WRIGHT, ESQ., hereby certify that on the 21<sup>st</sup> day of June, 1976, I served two (2) copies of Reply Brief for Appellant upon Anthony A. Dean, Esq., of the law firm of Cravath, Swaine & Moore, One Chase Manhattan Plaza, New York, NY 10005, attorneys for the Defendant-Appellees; Abex Corporation; The Retirement Board of the Retirement Plan for Salaried Employees of Abex Corporation; Donald K. Rennie and Illinois Central Industries, Inc., by placing two correct copies thereof in an envelope with proper postage affixed thereto, and caused said envelope to be deposited in a regular depository for the U.S. mail, addressed to him at the above address, his last known address.

  
Richard J. Wright, Esq.  
A member of the firm  
DeBonis and Wright, P.C.  
25 Main Street  
Poultney, Vermont 05764

DeBONIS & WRIGHT  
A PROFESSIONAL  
CORPORATION  
ATTORNEYS AT LAW  
25 MAIN STREET  
POULTNEY, VERMONT 05764